

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN A. LYNCH

Claimant

VS.

BEECH AIRCRAFT

Respondent

AND

SELF-INSURED

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 170,546

ORDER

ON April 21, 1994, the application of the claimant for review of an Award entered by Special Administrative Law Judge William F. Morrissey, dated January 27, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Robert R. Lee of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, David S. Wooding of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, James R. Roth of Wichita, Kansas. There were no other appearances.

RECORD

The record considered on appeal is the same as that set forth in Special Administrative Law Judge William F. Morrissey's Award dated January 27, 1994.

STIPULATIONS

The Appeals Board adopts the stipulations as set forth in Special Administrative Law Judge William F. Morrissey's Award dated January 27, 1994.

ISSUES

Claimant appeals from a decision by the Special Administrative Law Judge finding that his injury of October 6, 1992, resulted in a temporary aggravation of a pre-existing condition but resulted in no permanent disability. Claimant contends that greater weight of the evidence supports a finding of permanent disability and requests an award based upon a twenty-five percent (25%) permanent partial impairment.

Respondent contends that the claimant suffered only temporary aggravation, as found by the Special Administrative Law Judge, and argues in the alternative that in the event that claimant did suffer additional permanent injury the Fund should be responsible for any and all benefits awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds, for reasons stated below, that claimant did suffer an aggravation of a pre-existing condition as a result of an accidental injury arising out of and in the course of his employment on October 6, 1992. The Appeals Board further finds that said aggravation resulted in additional permanent impairment and that following said aggravation claimant has a twenty-five percent (25%) permanent partial impairment of the body as a whole. Finally, the Appeals Board agrees that the Workers Compensation Fund should be liable for all benefits awarded.

Claimant was injured on October 6, 1992, while standing in line waiting to clock out. He was hit in the side by someone running behind him, causing him to twist violently. He had a sharp pain in his back and pain in his right leg. Claimant was off work for six (6) weeks, provided conservative treatment and released with a fifty (50) pound weight lifting restriction.

Claimant has a history of low back problems which date back to an injury in 1989. He did not lose time from work as a result of the 1989 injury and did not seek additional treatment until July 1992. In July 1992 he went to his family physician, Dr. James L. Barber. Dr. Barber ordered a CT scan and then sent claimant to see Dr. Lesko. It appears that in June 1992 claimant was injured at home when he slid after kicking a ball. Dr. Lesko first saw the claimant on July 15, 1992. He diagnosed spinal stenosis secondary to bulging discs at multiple levels. He ordered epidurals and recommended temporary weight lifting restrictions. He saw claimant again on July 29, 1992, and decreased the weight restrictions. Finally, on August 14, 1992, he released claimant to return to work without restrictions. Claimant was injured again at work in September 1992 when he picked up a roll of material. He reported the injury to his supervisor and he was sent to the fitness center where they put on a back brace and recommended a fifty (50) pound lifting restriction. The injury at issue in this case then occurred on October 6, 1992. Claimant did not make a claim for the September injury.

As above indicated, respondent contends that the prior history reflects a pre-existing condition which was temporarily aggravated on October 6, 1992, and argues that no additional permanency resulted. In support of its argument, respondent contends that claimant's testimony, suggesting his condition became permanently worse after October

6, 1992, should be discredited. Respondent points out that claimant did not reveal the injury at home in June when he slid after kicking a ball. Respondent also notes that claimant has denied pain in his leg prior to the October incident when, in fact, the record reflects at least some numbness in his leg.

In viewing the evidence as a whole, the Appeals Board concludes that claimant may not have been fully forthright in history relating to the incident at home. However, the record otherwise supports his claim and his testimony as to increased permanency appears credible. As indicated, claimant did not file a claim for the September incident and claims no permanency resulting from that incident at work. He does, however, contend that following the October 6, 1992, incident his low back has been worse and that he now has constant pain. He also states that he still has pain in his right leg on an occasional basis.

Both Dr. Lesko and Dr. Eyster testified by deposition. Although Dr. Lesko indicates it would not have been inappropriate to impose a fifty (50) pound lifting restriction prior to the October 6, 1992 injury, similar to the restriction imposed after the October 6 injury, he did not, in fact, impose any restrictions at the time he released claimant to return to work. Contrary to suggestion in the Award of Special Administrative Law Judge Morrissey, Dr. Lesko does not give an opinion that the October incident provided a temporary exacerbation only. He does give general testimony that the October incident aggravated the injury. However, he does not give an opinion as to permanency. Dr. Eyster does indicate that the October incident did not cause any additional permanent injury. However, when asked a hypothetical question which the Appeals Board believes to have appropriately reflected the facts of the case, Dr. Eyster does acknowledge that if those facts were true then the claimant's October incident likely did cause additional permanency.

Dr. Schlachter also testified by deposition. He had examined the claimant on February 8, 1993, and had reviewed the records of the treating physicians, including the MRI report and the CT scan report. From the examination, history provided by the claimant, and history reflected in the records, Dr. Schlachter testified that, in his opinion, the October incident had caused additional permanent disability. He states that he based this conclusion both on the comparison of the MRI and CT reports and the history given to him by the claimant. The Appeals Board doubts that the comparison of the MRI and CT scan reports could provide any significant support for Dr. Schlachter's conclusion. Dr. Eyster had reviewed both tests and testified that no conclusions could be drawn from a comparison. Both physicians acknowledged that the tests are very different types of tests. However, the Appeals Board does agree that the history given by the claimant supports Dr. Schlachter's conclusion.

Dr. Schlachter testified as to his evaluation of claimant's permanent impairment. He states that in his opinion that claimant has a twenty-five percent (25%) impairment as a result of chronic lumbar sacral strain with aggravation of pre-existing disc disease and pre-existing spinal stenosis. Although Dr. Eyster concluded claimant suffered no additional permanent impairment from the October 6, 1992 accident, he does rate claimant's disability at seven to ten percent (7-10%) of general disability.

From the record as a whole, the Appeals Board concludes the rating given by Dr. Schlachter is more consistent with impairment demonstrated. Claimant has more or less constant back pain and has occasional radiating pain in his left leg. He takes Percodan

approximately fifteen (15) times per month for relief of acute episodes. The MRI reflects central disc protrusion at L2-3 with spinal stenosis. He has disc disease at L2-3, L3-4, L4-5 and L5-S1. Dr. Schlachter recommended as restrictions no repetitive kneeling, squatting or working in awkward positions. He also recommended no repetitive lifting over thirty (30) pounds and no single lift over forty (40) pounds. Dr. Eyster recommends less severe permanent restrictions but does indicate claimant should not lift over fifty (50) pounds and should not do repetitive bending or twisting. The evidence, taken as a whole, does support Dr. Schlachter's rating. The Appeals Board finds claimant does have a twenty-five percent (25%) general permanent partial impairment as a result of a permanent aggravation of claimant's pre-existing condition due to an October 6, 1992 injury.

(2) The Appeals Board finds that the Kansas Workers Compensation Fund should be responsible for all of the benefits awarded in this claim.

The Kansas Workers Compensation Fund is required to pay all of the benefits in those instances where the respondent had knowledge of a pre-existing impairment and claimant's injury probably or most likely would not have occurred but for that pre-existing impairment. K.S.A. 44-567. Respondent had knowledge of claimant's previous low back problems and had filed a Form 88 as a result of a 1989 injury. Claimant testified that respondent was aware of the incident in September 1992. He reported it to his supervisor and sought treatment with the company physicians. He was given a back brace and lifting restrictions were recommended.

Dr. Schlachter testified that in his opinion the increased permanency would not have occurred but for the pre-existing conditions. Neither Dr. Eyster nor Dr. Lesko contradicts the conclusion that the aggravation of October 6, 1992, would not have occurred but for the pre-existing condition. The Appeals Board therefore finds that benefits awarded in this claim should all be paid for by the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Special Administrative Law Judge William F. Morrissey's Award, dated January 27, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the Kansas Workers Compensation Fund for an accidental injury occurring on October 6, 1992, based on an average weekly wage of \$515.20 for 6 weeks of temporary total disability compensation at the rate of \$299.00 in the sum of \$1,794.00 followed by 409 weeks at the rate of \$85.87 for a sum of \$35,120.83 for a 25% permanent partial disability for a total award of \$36,914.83.

As of September 23, 1994, there is due and owing claimant 6 weeks temporary total disability compensation at the rate of \$299.00 per week in the sum of \$1,794.00 and 96.57 weeks permanent partial disability at the rate of \$85.87 in the sum of \$8,292.47 for a sum due and owing claimant of \$10,086.47 to be paid in one lump sum, less any amounts previously paid. The remaining \$26,828.36 is to be paid at the rate of \$85.87 for 312.43 weeks until fully paid or by further order of the Director.

Claimant's contract of employment with his counsel is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed to the Kansas Workers Compensation Fund to be paid directly as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services Regular hearing of May 26, 1993	\$277.30
Barber & Associates Deposition of Ernest R. Schlachter, M.D.	\$295.00
Deposition of James L. Barber, M.D.	\$143.20
Deposition of Robert L. Eyster, M.D.	\$193.60
Deposition of Paul D. Lesko, M.D.	\$137.00

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, 1861 N. Rock Road, Suite 320, Wichita, KS 67206
David S. Wooding, 220 W. Douglas, Suite 300, Wichita, KS 67201
James R. Roth, 833 N. Waco, Wichita, KS 67201
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director